Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	CC Dockets Nos. 95-20, 98-10

Reply Comments of the Information Technology Association of America

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SUMMARY

The Commission should decline the Bell Operating Companies' invitation to completely dismantle the pro-competitive regulatory regime governing their participation in the broadband telecommunications and information services markets.

The ILECs have the Ability And Incentive to Act Anti-Competitively in the Market for Wholesale Broadband Telecommunications Services Sold to ISPs

The foundation of the BOCs' proposals to eliminate the Commission's existing regulatory regime is their assertion that – given the growth of cable and other broadband transmission "platforms" – ILECs no longer have either the incentive or the ability to discriminate in the provision of broadband telecommunications services to non-affiliated ISPs. This is simply not true.

While some *retail* customers may have their choice of broadband Internet access providers, ISPs remain critically dependent on the ILECs for *wholesale* broadband telecommunications service necessary to serve their subscribers. Cable systems are not yet a viable alternative source of local broadband transmission service for most ISPs. Indeed, to date, *no* cable system has offered to provide a stand-alone broadband transmission service to all ISPs that request it. Similarly, due to higher costs, limited geographic availability, and technical limitations, wireless and satellite providers do not offer non-ILEC-affiliated ISPs a viable alternative source of supply of broadband transmission service.

The D.C. Circuit's recent decision in *USTA v. FCC* does not preclude the Commission from taking effective action to promote a competitive broadband information services market. Because ISPs have never been expected to deploy their own facilities, and because the rates that the ILECs charge for services provided to ISPs can include recovery of the ILECs' historic costs,

the D.C. Circuit's concerns about the impact of unbundling and TELRIC pricing on facilities deployment are entirely irrelevant to this proceeding.

Nor do the court's views regarding the state of broadband competition preclude the Commission from taking effective regulatory action. In the recent *ILEC Broadband Non-dominance Notice,* the Commission for the first time sought to determine whether there is a separate "wholesale" market for the provision of broadband telecommunications services to ISPs. The comments in that proceeding make clear there is a distinct market for wholesale mass-market broadband telecommunications services – in which the ILECs remain dominant players.

Regardless of the Decision Made in the *Cable Internet Declaratory Ruling,* the Commission Need Not – and, Indeed, Cannot – Eliminate the ILECs' Unbundling Obligations

The BOCs are also wrong to suggest that, because the Commission has declined to treat cable system operators as common carriers, or to require them to comply with the *Computer II* unbundling requirements, the Commission must eliminate all regulation governing the ILECs' provision of broadband services. While the Telecommunications Act removed legal barriers to inter-modal competition, it did not abolish the separate regulatory regimes applicable to ILECs and cable system operators. To the contrary, Congress imposed specific regulatory obligations solely on the ILECs, which are designed to promote competition. Congress' decision to impose special obligations on the ILECs reflects the unique role that they continue to play as the only ubiquitous source of "last mile" transmission capacity.

The Commission Cannot Permit the ILECs to Offer "Stand-Alone" Broadband Telecommunications Services on a Private Carrier Basis

The BOCs also wrongly contend that the Commission has the authority to reclassify ILECs as private carriers when they provide "stand-alone" broadband telecommunications services. At bottom, the BOCs are really asking the Commission to *forebear* from requiring

ILECs to comply with the requirement – which the Commission has repeatedly held is embodied in Section 202 of the Communications Act – that facilities-based carriers unbundle the broadband wireline telecommunications services that they use to provide information services and make them available to non-affiliated ISPs on just, reasonable, and non-discriminatory prices, terms, and conditions. Doing so would contravene the express limit on the Commission's forbearance authority contained in Section 10 of the Communications Act.

The Commission Cannot and Should Not Require ISPs to Make Direct Payments to the Universal Service Fund

Finally, the Commission should reject the suggestion, made by SBC and BellSouth, that the agency use its "permissive authority" under Section 254(d) of the Communications Act – which allows the Commission to require "provider[s] of interstate telecommunications . . .to contribute to the preservation and advancement of universal service" – to require ISPs to make direct payments to the Universal Service Fund. The BOCs have ignored the statutory language, directly relevant legislative history, prior Commission decisions, and judicial precedent. As the Senate Committee Report that accompanied the Telecommunications Act explained, "Information Service Providers do not *'provide'* telecommunications services; they are *users* of telecommunications services."

The Commission should also reject the plan put forward by Verizon, under which "all broadband providers," including broadband ISPs, would be required "to contribute to the schools and libraries" portion of the USF. Contrary to Verizon's assertion, there is nothing "inequitable" about ISPs not having to pay into the schools and libraries portion of the USF when their services are "subsidized." The Commission and the Court of Appeals have long recognized that "equity" does not require any equivalency between the amount that a given entity pays into the USF and the amount that it receives from the fund.

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Reply Comments of the Information Technology Association of America

The Information Technology Association of America ("ITAA") hereby replies to the comments filed by the Bell Operating Companies ("BOCs") in response to the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1]

INTRODUCTION

In their comments, the BOCs ask the Commission to completely dismantle the pro-competitive regulatory regime governing their participation in the broadband telecommunications and information services markets. Under the BOCs' approach, the Commission would: (1) "reclassify" ILEC broadband telecommunications services as private carrier offerings, thereby eliminating the regulatory requirements contained in Title II of the Communications Act; (2) lift the unbundling and other pro-competitive safeguards that the

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Notice*").

Commission adopted in the *Second Computer Inquiry*; and (3) require broadband Internet Service Providers ("ISPs") to make direct payments to the Universal Service Fund ("USF").

The BOCs' arguments are based on four fundamental assumptions:

- There is no need for regulation of the ILECs' broadband telecommunications services because – as a result of inter-modal competition – the ILECs lack the incentive or ability to discriminate in the provision of these services to non-affiliated ISPs.

- Because the Commission declined to treat cable system operators that offer "cable modem" service as common carriers, or to require them to comply with the *Computer II* requirements, the Commission is obligated to eliminate all regulation governing the ILECs' provision of broadband services.

- The Commission has the legal authority to eliminate all Title II obligations currently applicable to the BOCs' provision of broadband telecommunications by reclassifying these offerings as private carriage.

- The Commission can use its legal authority to require "provider[s] of interstate telecommunications . . . to contribute to the preservation and advancement of universal service" [2] to require ISPs to make direct payments to the Universal Service Fund.

As demonstrated below, each of these assumptions is demonstrably wrong.

I. THE ILECS HAVE THE ABILITY AND INCENTIVE TO ACT ANTI-COMPETITIVELY IN THE MARKET FOR WHOLESALE BROADBAND TELECOMMUNICATIONS SERVICES SOLD TO ISPS

The foundation of the BOCs' proposals to eliminate the Commission's existing regulatory regime is their assertion that – given the growth of cable and other broadband transmission "platforms" – ILECs no longer have either the incentive or the ability to

[2] *See* 47 U.S.C. § 254(d).

discriminate in the provision of broadband telecommunications services to non-affiliated ISPs.[3] This is simply not true.

A. The ILECs have the Incentive to Act Anti-Competitively

The BOCs' assertion that ILECs have no *incentive* to provide broadband telecommunications services to non-affiliated ISPs on unreasonable or discriminatory terms is completely unconvincing.

At the present time, the ILECs provide approximately 93 percent of the wireline broadband Internet access service in the United States.[4] The ILECs have every incentive to try to drive non-affiliated wireline ISPs out of the market. If the ILECs are able to do so, they will be able to raise prices for retail broadband wireline Internet access services with little risk of losing retail customers.[5] The increased revenues from sales of broadband Internet access service

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[3] *See, e.g.,* Comments of BellSouth Corp. at 15-16 (filed May 3, 2002) ("Bellsouth Comments") ("ILECs are no longer the only means of obtaining access to customers for the provision of information services. . . . [T]he telephone network is no longer the 'primary' means through which ISPs access their customers."); Comments of Qwest Communications International at 16-17 (filed May 3, 2002) ("Qwest Comments") ("ILECs . . . face existing and extensive competition from cable, wireless, and satellite providers in offering those services . . .to . . .wholesale customers. Given this competition, there is little basis for concern that ILECs will discriminate against particular ISPs."); *id.* at 23 (The *Computer II* unbundling rules "have no place in the competitive broadband market . . . where ISPs can turn not only to ILECs, but to competing CLECs, cable modem providers, and satellite providers . . . to obtain. . . broadband transmission."); *id.* at 27 ("[T]he *Computer II* unbundling rule is altogether unnecessary . . . because other providers [besides the ILECs] . . . stand ready to serve ISPs and provide them with access to their end user customers."); Comments of SBC Communications, Inc. at 9-10 (filed May 3, 2002) ("SBC Comments") ("Cable and wireline broadband – along with satellite and wireless – compete directly in a single, highly competitive market for broadband Internet access."); Comments of Verizon at 34-35 (filed May 3, 2002) ("Verizon Comments") ("[T]he Bell companies have no bottleneck control over the networks used to deliver broadband access, and ISPs need not 'obtain basic service from BOCs' to reach their customers.").

[4] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Report, 17 FCC Rcd 2844, 2939 (2002) ("*Third Advanced Services Deployment Report*").

[5] As ITAA explained in its comments, in "some markets, consumers would have no alternate provider of broadband Internet access services. While consumers in other markets might have the option of switching to a cable-based Internet access service, many would be deterred from doing so as a result of long-term contracts signed with the ILEC or because of the investment they had made in DSL premises-based equipment." Comments of the Information Technology Association of America at 16 (filed May 3, 2002) ("ITAA Comments") (citing Comments

to retail customers would more than offset the revenue loss from reduced sales of wholesale telecommunications service to the non-affiliated ISPs.

B. The Existence of Inter-Modal Competition in the *Retail* Broadband Internet Access Service Market Does Not Prevent the ILECs from Providing *Wholesale* Broadband Telecommunications Services to Non-Affiliated ISPs on Unreasonable or Discriminatory Terms

Given the ILECs' clear incentive to act anti-competitively, the relevant question for the Commission is: If an ILEC seeks to obtain a competitive advantage in the broadband Internet access market by restricting the supply, reducing the quality, or raising the price of the broadband telecommunications services they provide to non-affiliated ISPs, can the ISPs obtain substitute broadband transmission service from cable, wireless, or satellite providers in sufficient quantity to provide a competitive service? The answer, clearly, is no. While some consumers may be able to obtain *retail* Internet access service from a variety of providers,[6] the undisputed fact is that non-ILEC-affiliated ISPs remain critically dependent on the ILECs for the *wholesale* broadband transmission services necessary to provide competing broadband Internet access services to residential and small business customers.

The record in this proceeding – as well as in the *ILEC Broadband Non-Dominance* docket – makes clear that cable systems are not yet a viable alternative source of local broadband transmission service for most ISPs.[7] Indeed, many cable systems have not yet offered to provide

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of the ITAA, *Review of Regulatory Requirements for Incumbent Local Exchange Carrier Broadband Telecommunications Services*, CC Docket No. 01-337, at 8-9 (filed Apr. 22 2002). ("*ITAA ILEC Broadband Non-Dominance Comments*")).

[6] Indeed, as the Commission has recognized, some consumers do not yet have access to *any* broadband telecommunications service. *See, e.g., Third Advanced Services Deployment Report*, 17 FCC Rcd at 2858, 2943 (estimating that business and residential customers in areas covered by 22% of U.S. Postal Service zip codes have no high-speed service provider).

[7] *See* Comments of the Information Technology Association of America, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337 at 14 ("[A]n ISP that is unable to

any broadband transmission services to ISPs. Moreover, in those cases in which cable systems are providing broadband transmission service, there are significant limitations. As the Commission has recognized, "[m]ost cable systems provide only one brand of cable modem service on any system."[8] Indeed, to date, *no* cable system has offered to provide a stand-alone broadband transmission service to all ISPs that request it. Given the limited capacity of typical cable systems, it may never be possible for any cable system to do so. At most, cable systems are likely to enter into "joint marketing" or other "teaming" agreements with a small number of handpicked ISPs. Even those ISPs, however, will not be able to access those customers that have telephone service, but are not connected to an "upgraded" cable network.[9]

Nor do wireless and satellite providers offer non-ILEC-affiliated ISPs a viable alternative source of supply of broadband transmission service. At the present time, wireless and satellite providers are niche players in the broadband Internet access market. Due to higher costs, limited geographic availability, and technical limitations, it is by no means clear that these providers will ever occupy a significant position. Even if they do, they may choose to continue to bundle their broadband transmission capacity with their own Internet access service, rather than providing capacity to ISPs on a "stand alone" basis.

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obtain wholesale broadband telecommunications services from an ILEC at a reasonable price cannot obtain a substitute service from a cable system operator. At most, the ISP may be able to negotiate a commercial agreement to "partner" with the cable system operator. ").

[8] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling, 17 FCC Rcd 4798, 4828 (2002)("*Cable Internet Declaratory Ruling*").

[9] *See, e.g.,* Comments of AT&T Corp., *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337 at 41-43, Decl. of Robert Willig at 5-6 (filed Mar. 1, 2002) ("Cable modem service is currently available to only about 60% of the homes passed by AT&T Broadband cable systems. Similarly, where cable modem service is available to residential consumers, it generally is not available to businesses because cable systems generally do not extend to business districts. There are thus both entire geographic areas and customer classes within geographic areas that may have no meaningful broadband alternative to the DSL and narrowband services that are provided (in whole or in part) over the ILEC's bottleneck facilities").

Thus, the Commission cannot assume that, in the event an ILEC does not provide broadband telecommunications services on just and reasonable terms, non-affiliated ISPs will be able to meet their needs for broadband transmission service by entering into agreements with cable, satellite, or wireless providers. The Commission, therefore, cannot rely on market forces to constrain ILEC anti-competitive conduct. Rather, the Commission must preserve the existing regulations that require the ILECs to provide unbundled broadband telecommunications services to non-affiliated ISPs on a just, reasonable, and non-discriminatory basis. [10]

C. The D.C. Circuit's Recent Decision in *USTA* Does Not Preclude the Commission from Taking Effective Action to Promote a Competitive Broadband Information Services Market

The Commission has extended the reply period in this proceeding in order to allow interested parties to comment on the implications of the D.C. Circuit's recent decision in *USTA v. FCC.* [11] In *USTA,* the court remanded the Commission's *UNE Remand* and *Line Sharing*

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[10] In its comments, SBC asserts that it has negotiated a memorandum of understanding ("MOU") with the an entity known as the U.S. Internet Industry Association ("USIIA") regarding SBC's provision of wholesale broadband telecommunications services to USIIA's members. SBC asserts that the adoption of this MOU demonstrates that ISPs "recognized that the market – and, importantly, the existence of significant intermodal competition between competing broadband platforms – will permit them access [to broadband telecommunications services] on reasonable terms" without the need for regulation. SBC Comments at 29. The Commission should place no reliance on this assertion. As an initial matter, there is no basis to conclude that USIIA represents the views of most ISPs. Indeed, neither its comments nor its website indicate who USIIA's members are or what relationship, if any, they have to the Bell Companies. (By comparison, ITAA – which has represented the interests of ISPs for more than thirty years – lists it members on its website. *See* www.itaa.org/about/members.cfm.) In any case, the MOU is little more than a general statement supporting radical deregulation followed by SBC's non-binding "commitment" that "commercial agreements for high-speed Internet access will be available and negotiated between SBC and ISPs . . . for the provision of Internet services to end users." *See* Letter from Donald E. Cain, SBC Communications, Inc. and David P. McClure, U.S. Internet Industry Assoc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 02-33, 95-20, 98-10 Memorandum of Understanding attachment at 2 (filed May 3, 2002).

[11] *See United States Telecom Ass'n v. FCC,* Nos. 00-1012 & 00-1015, 2002 U.S. App. LEXIS 9834 (D.C. Cir. May 24, 2002) ("*USTA*").

Orders.[12] The ILECs are likely to argue that *USTA* stands for at least two propositions. First, that requiring the ILECs to unbundle their networks is generally undesirable because it removes incentives for facilities deployment. And, second, that there is a single, competitive broadband market – and, therefore, that there is no justification for the Commission to regulate the ILECs' provision of broadband telecommunications services. The Commission should reject any invitation to read the *USTA* decision in so expansive a manner.

The D.C. Circuit devoted most of its decision to its review of the *UNE Remand Order.* The court criticized the Commission for not adequately considering the extent to which requiring the ILECs to physically unbundle their networks, and lease the unbundled network elements to competitive local exchange carriers ("CLECs") at prices based on the Commission's total element long-run incremental cost ("TELRIC") methodology, would reduce the incentives of both ILECs and CLECs to deploy new telecommunications facilities.

The court devoted considerably less attention to the *Line Sharing Order.* The court noted the Commission's findings, in the *Advanced Services Deployment Reports,* that numerous providers – including cable and satellite operators – are offering broadband services.[13] Given these findings, the court suggested that the Commission had "no reason to think" that ordering ILECs to allow CLECs to lease the upper frequency on the loop in order to provide a competitive

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[12] Language in the text of the opinion could be construed to mean that the court also vacated the *Line Sharing Order.* However, the court did not conduct the customary analysis used to determine whether to vacate an agency decision, *see Allied-Signal, Inc. v. NRC,* 988 F.2d 146, 150 (D.C. Cir. 1993). Nor did the ordering clause indicate that the court intended to vacate the decision. *See USTA,* 2002 U.S. App. LEXIS 9834, at *42 ("We . . . remand both the Line Sharing Order and the Local Competition Order to the Commission for further consideration in accordance with the principles outlined above.").

[13] *See USTA,* 2002 U.S. App. LEXIS 9834 at *37.

DSL service "would bring on a significant enhancement of [broadband telecommunications] competition."[14]

The D.C. Circuit's concern about the impact of network element unbundling on carriers' incentives to deploy telecommunications facilities has *no application* to the type of unbundling at issue in this proceeding. In *USTA,* the court considered Commission rules that enable CLECs to lease unbundled *physical elements* of the ILECs' networks at prices based on forward-looking incremental costs. In the present proceeding, by contrast, the Commission is considering the ILECs' obligation to allow ISPs to purchase unbundled telecommunication *services* at just and reasonable prices. Because ISPs have never been expected to deploy their own facilities, and because the rates that the ILECs charge for services provided to ISPs can include recovery of the ILECs' historic (rather than forward-looking incremental) costs, the D.C. Circuit's concerns about the impact of unbundling on facilities deployment are entirely irrelevant to this proceeding.

Nor do the court's views regarding the state of broadband competition preclude the Commission from taking effective regulatory action. The Commission's *Advanced Services Deployment Reports*, on which the D.C. Circuit relied, have focused on the existence of *retail* broadband competition. In the recent *ILEC Broadband Non-dominance Notice,* however, the Commission for the first time sought to determine whether there is a separate "wholesale" market for the provision of broadband telecommunications services to ISPs.[15] As ITAA demonstrated in its comments in that proceeding, there is a distinct market for wholesale mass-

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[14] *Id.* at *41.

[15] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, ¶ 24 (rel. Dec. 20, 2001).

market broadband telecommunications services – in which the ILECs remain dominant players.[16] The Commission, therefore, now has a more than adequate justification for continuing to require the ILECs to unbundle the broadband telecommunications services that they use to offer broadband information services, and to make them available to non-affiliated ISPs on just, reasonable, and non-discriminatory prices, terms, and conditions.

II. REGARDLESS OF THE DECISION MADE IN THE *CABLE INTERNET DECLARATORY RULING*, THE COMMISSION NEED NOT – AND, INDEED, CANNOT – ELIMINATE THE ILECS' UNBUNDLING OBLIGATIONS

The BOCs next contend that, because the Commission's decision in the *Cable Internet Declaratory Ruling* declined to treat cable system operators as common carriers, or to require them to comply with the *Computer II* unbundling requirements, the Commission must eliminate all regulation governing the ILECs' provision of broadband services.[17] Whatever the merits of the Commission's decision not to "*extend*"[18] the regulatory regime applicable to the ILECs' provision of wireline information services to cable-based information services may be, it plainly does not require the Commission to *eliminate* the long-established regulatory regime applicable to the ILECs participation in the information services market.

While the Telecommunications Act removed legal barriers to inter-modal competition, it did not abolish the separate regulatory regimes applicable to ILECs and cable system operators.

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[16] *See ITAA ILEC Broadband Non-Dominance Comments* at 5-22.

[17] *See, e.g.,* BellSouth Comments at 14-15 ("The Commission cannot find cable modem service free of *Computer Inquiry* obligations but at the same time continue to impose such obligations on the ILECs. . . . Because the Commission has found cable modem and broadband Internet access services to be equivalent, it must treat the providers of those [sic] alike."); Qwest Comments at 29 (There is no "legal basis for applying the *Computer II* unbundling rule to wireline broadband services when it does not apply to the directly competitive offerings of cable operators.").

[18] *Cable Internet Declaratory Ruling,* 17 FCC Rcd at 4825-26.

To the contrary, Congress imposed specific regulatory obligations solely on the ILECs, which are designed to promote competition.[19] These obligations, as the D.C. Circuit has recognized, are fully applicable to ILEC provision of broadband telecommunications services.[20]

Congress' decision to impose special obligations on the ILECs reflects the unique role that they continue to play as the only ubiquitous source of "last mile" transmission capacity. The ILECs' local networks were constructed in order to transport information provided by others. They remain the only transmission platform that an ISP can use to access virtually any business or residence in the country. By contrast, cable systems were designed to provide one-way transmission of multi-channel video programming.

Contrary to the BOCs' suggestion,[21] nothing in Section 706 of the Telecommunications Act requires the Commission to treat ILECs and cable systems identically. Section 706, which is codified as a footnote to Title I of the Communications Act, is merely a general directive to the Commission to "encourage the deployment . . . of advanced telecommunications capability."[22] The Commission is to do so using whatever regulatory tools it believes best suited – whether by

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[19] *See, e.g.*, 47 U.S.C. §§ 251(c).

[20] *WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) ("DSL-based advanced services qualify as 'telecommunications services' . . .").

[21] *See, e.g.*, SBC Comments at 11-13 (Section 706 of the Telecommunications Act imposes on the Commission "an affirmative legal obligation to adopt a functional broadband approach that treats like services alike."); Verizon Comments at 24 ("Section 706 of the 1996 Act makes it clear that advanced telecommunications capability is to be defined and regulated 'without regard to any transmission media or technology.' . . . It would thus flatly contradict the 1996 Act to regulate broadband transmission differently depending on the facilities or medium of transmission used . . . .").

[22] 47 U.S.C. § 157 nt.

regulating dominant providers in a more efficient manner, eliminating regulation that is no longer necessary, or taking affirmative measures that promote competition. [23]

The *only* reference to "platform neutrality" is in the definition, which states that "advanced telecommunications capability" is defined as high-speed broadband telecommunications "without regard to any transmission media or technology."[24] While this provision demonstrates Congress' awareness that numerous technologies can be used to provide broadband telecommunications, nothing in the language of the statute – or in the legislative history – suggests that Congress intended to over-ride the distinction contained elsewhere in the Communications Act between ILECs and other providers, or to divest the Commission of its authority to apply different regulatory approaches to different providers.

III. THE COMMISSION CANNOT PERMIT THE ILECS TO OFFER "STAND-ALONE" BROADBAND TELECOMMUNICATIONS SERVICES ON A PRIVATE CARRIER BASIS

In their comments, the BOCs ask the Commission to reclassify ILECs as private carriers when they provide "stand-alone" broadband telecommunications services.[25] The Commission should make no mistake about what the BOCs are requesting. If the Commission allows the

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[23] *See id.*

[24] *Id.* at (c)(1).

[25] *See, e.g.,* BellSouth Comments at 24 ("The Commission . . . has the authority" to reclassify ILEC broadband services as private carriage because they face "actual or potential competition."); Qwest Comments at 15-17 ("ILECs already provide" wholesale DSL services to ISPs "on a private carriage basis in everything but name." These services are sold to "ISPs alone, not 'the public.'"); Verizon Comments at 12-14 ("The mere fact that local telephone companies are regulated under Title II when they provide narrowband voice transmission provides no impediment to regulating their broadband transmission under Title I . . . [because] the market is truly competitive." There is no need to impose Title II regulation "in order to prevent the exercise of market power."); *id.* at 27 ("For the Commission to retain common-carrier regulations for local telephone companies in their provision of broadband would, given their lack of market power, . . . lack any rational basis, especially in view of the Commission's decision *not* to regulate the dominant cable companies as common carriers.").

ILECs to provide broadband telecommunications service on a private carrier basis, the ILECs will have the legal right to *refuse* to provide broadband telecommunications to some, or all, non-affiliated ISPs – or to provide these services at prices, terms, and conditions that are significantly less favorable than those on which the ILECs provide the service to themselves and their affiliates. The Commission should decline to allow the ILECs to do so.[26]

The BOCs place significant reliance on the claim that the broadband market is competitive. As demonstrated above, however, this is plainly not the case – at least at the wholesale level. As a result, in most cases, a decision by an ILEC not to provide broadband telecommunications to an ISP – or to provide it on discriminatory prices, terms, and conditions – would make it literally *impossible* for the ISP to provide competitive broadband information services. The end-result would be to replace the current vibrant market for dial-up Internet access services – in which, thanks to the Commission's rules, numerous ISPs provide competitive service using the ILECs' narrowband telecommunications services – with a broadband Internet access market dominated by a handful of facilities-based providers and their hand-picked ISP "partners."

In any case, regardless of the level of competition in the broadband telecommunications market, the Commission lacks the legal authority to permit the ILECs to provide wireline broadband telecommunications services on a private carrier basis. At bottom, the BOCs' request to be *reclassified* as private carriers when they provide broadband telecommunications service is

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[26] The Commission has been down this road before. In 1990, the Commission proposed to "permit IXCs to provide a limited amount of [telecommunications] service" – exclusively service provided to "high-end" business customers – "on a private carriage basis." *Competition in the Interstate Interexchange Marketplace,* Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2644-45 (1990). In the face of significant questions as to the Commission's legal authority to adopt even this limited proposal, the agency subsequently declined to adopt it. *See Competition in the Interstate Interexchange Marketplace,* First Report and Order, 6 FCC Rcd 5880, 5897 n.150. (1991).

really a request that the Commission *forebear* from requiring ILECs to comply with the obligation, contained in Section 202 of the Communications Act, to unbundle the broadband wireline telecommunications services that they use to provide information services and make them available to non-affiliated ISPs on just, reasonable, and non-discriminatory prices, terms, and conditions.[27] This the Commission cannot do.

Section 10 of the Communications Act authorizes the Commission to forebear from requiring telecommunications carriers to comply with the requirements contained in Title II. [28] Section 10, however, contains a number of restrictions. In particular, it precludes the Commission from exercising its forbearance authority if the regulations are necessary to "ensure" that the carrier provides telecommunications services on prices, terms, and conditions that are just, reasonable, and non-discriminatory. If the Commission were to reclassify ILECs as private carriers when they provide broadband wireline telecommunications services, it would eliminate that assurance. By definition, an entity that is classified as a private carrier is not obligated to provide telecommunications service on just, reasonable, and non-discriminatory prices, terms, and conditions.

The D.C. Circuit has made clear that the Commission cannot side step the restrictions contained in Section 10 by "reclassifying" an ILEC. In the *SBC/Ameritech Merger Order,* the Commission sought to excuse the ILECs from the obligation to comply with the unbundling and resale obligations specified in Section 251 of the Communications Act when they provided broadband services. Because Section 10 precludes the Commission from forbearing from these

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[27] In its initial comments, ITAA noted that the Commission has repeatedly held that Section 202 imposes an unbundling obligation that is comparable to, but separate from, the one that the Commission imposed in the *Second Computer Inquiry. See* ITAA Comments at 13-15.

obligations, the Commission ruled that an ILEC would no longer be classified as an incumbent – and therefore would no longer be subject to the Section 251 requirements – when it offered advanced telecommunications services through a structurally separate affiliate, subject to a variety of competitive safeguards. The Commission believed this was appropriate given the existence of competition in the broadband market.[29]

In *ASCENT v. FCC*, the D.C. Circuit ruled that, regardless of the level of competition in the broadband telecommunications market, the Commission could not "circumvent" the limits on its forbearance authority by reclassifying an ILEC broadband separate affiliate as a "non-incumbent."[30] Rather, the court made clear, the Communications Act required the Commission to impose the same Title II obligations on the ILECs' broadband wireline telecommunications services that it must apply to the ILECs' conventional wireline telecommunications services.[31] Just as the Commission could not circumvent the restrictions on its forbearance power by reclassifying an incumbent local exchange carrier as a *non-incumbent* when it provides broadband telecommunications service, the Commission cannot circumvent the limits on its forbearance authority by reclassifying an incumbent local exchange carrier as a *non-carrier* when it provides broadband telecommunications services.

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[28] 47 U.S.C. § 150.

[29] *See Applications of Ameritech Corp., Transferor and SBC Communications, Inc., Transferee,* Memorandum Opinion & Order, 14 FCC Rcd 14712, 14893-14909 (1999).

[30] *Association of Communications Enterprises v. FCC,* 235 F.3d 662, 666 (D.C. Cir. 2001).

[31] *See id.* at 668 ("Congress did not treat advanced services differently from other telecommunications services. . . . [T]he Commission may not permit an ILEC to avoid" its statutory obligations.).

IV. THE COMMISSION CANNOT AND SHOULD NOT REQUIRE ISPS TO MAKE DIRECT PAYMENTS TO THE UNIVERSAL SERVICE FUND

Finally, several of the BOCs assert that the Commission can and should use its "permissive authority" under Section 254(d) of the Communications Act – which allows the Commission to require "provider[s] of interstate telecommunications . . . to contribute to the preservation and advancement of universal service"[32] – to require ISPs to make direct payments to the Universal Service Fund. Once again, the BOCs' assertion cannot withstand scrutiny.

A. ISPs Do Not "Provide" Telecommunications

SBC and BellSouth contend that – like interexchange carriers and resellers – ISPs "provide" telecommunications to their subscribers. This is simply wrong.

SBC and BellSouth have ignored the statutory language, directly relevant legislative history, prior Commission decisions, and judicial precedent. The Communications Act defines an information service as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[33] While that capability is made available "via telecommunications,"[34] this does not make an ISP a telecommunications provider. As the Senate Committee Report that accompanied the Telecommunications Act explained, "Information Service Providers do not *'provide'* telecommunications services; they are *users* of telecommunications services."[35]

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[32] 47 U.S.C. § 254(d).

[33] *Id.* § 153(20).

[34] *Id.*

[35] S. Rpt. 104-23, 104th Cong., 1st Sess., at 28 (1995) (emphasis added).

Consistent with this view, the Commission observed in the *Report to Congress on Universal Service* that:

> Under *Computer II*, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. The information service provider, indeed, is itself a user of telecommunications."[36]

Contrary to two BOCs' assertions, ISPs are fundamentally different from either resellers or interexchange carriers ("IXCs"). These providers offer a "pure" transmission service directly to the public for a fee – either over their own telecommunications facilities or facilities obtained from another carrier. Therefore, consistent with the Communications Act and the Commission's Rules, IXCs and resellers are classified as common carriers and, consequently, are subject to regulation under Title II of the Communications Act – including the obligation to make direct payments to the USF.

By contrast, an ISP that allows a subscriber to access its service is neither providing nor reselling a telecommunications service. This is clearly true when the subscriber accesses the ISP's service using its own dial-up connection. In this case, it is the local exchange carrier – not the ISP – that is providing telecommunication service to the subscriber. Even when an ISP "bundles" its service with a broadband transmission service, such as DSL, the ISP is doing nothing more than *using* telecommunications to deliver its non-regulated service to its subscribers. Because ISPs do not "provide" telecommunications, the Commission cannot use its "permissive authority" to require them to make direct payments to the USF.

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[36] *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11534 n.138 (1998).

As ITAA explained in its initial comments, any attempt to treat ISPs as carriers for *universal service* purposes would undermine the Commission's long-standing policy of treating ISPs as end-users for *access charge* purposes. Under this policy, ISPs are able to obtain physically local telecommunications connections on the same terms as other business users, rather than having to pay the same above-cost carrier access charges as interstate IXCs.[37]

SBC seeks to distinguish the Commission's long-standing access charge treatment of ISPs by asserting that this is an "exemption" from the Commission's general treatment of ISPs as telecommunications providers, which the agency adopted for "the limited purpose" of ensuring that ISPs "were not required to pay switched access charges for their interstate access."[38] SBC's theory is flatly inconsistent with history. While the Commission has sometimes used the term "ESP exemption" as convenient shorthand, ITAA has repeatedly explained that:

> The Commission's 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end-users. End-users compensate local exchange carriers for their use of the local telephone network by paying a mix of flat-rate Federal end-user charges and State charges. . . .The Commission's carrier access charge rules, adopted in the 1983 Order, make *no mention* of ESPs – much less purport to "exempt" ESPs from paying carrier access charges. Rather, the Commission has consistently recognized that ISPs are users of the telecommunications network and, therefore, are entitled to access it on the same terms and conditions as other users.[39]

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[37] ITAA Comments at 52.

[38] SBC Comments at 42 n.56.

[39] ITAA Comments at 52 n.147 (citations omitted).; *see ACS of Anchorage v. FCC*, No. 01-1059, 2002 U.S. App. LEXIS 9557, at *10 (D.C. Cir. May 21, 2002) ("Rather than directly exempting ESPs from interstate access charges, the Commission defined them as 'end users'..."). The Commission's treatment of ISPs stands in stark contrast to its treatment of resellers – which the agency has consistently classified as carriers. At the time it adopted the *Access Charge Order,* the Commission created an *express* exemption for resale carriers. *See MTS and WATS Market*

B. Allowing ISPs to Participate in the Schools and Libraries Program is Not Inequitable

Verizon urges the Commission to adopt a narrower plan, under which "all broadband providers" – including broadband ISPs – would be required "to contribute to the schools and libraries" portion of the USF.[40] Verizon argues that it would be "equitable" to require broadband providers to contribute to the schools and libraries portion of the USF because it is used "to subsidize the purchase of their services."[41] Like SBC and BellSouth, Verizon wrongly assumes that ISPs "provide" telecommunications. Because ISPs are users of telecommunications – rather than providers – the Commission does not have the legal authority to adopt this proposal.

Verizon is also wrong to suggest that there is anything "inequitable" about ISPs not having to pay into the schools and libraries portion of the USF when their services are "subsidized." As an initial matter, ISPs will not receive "subsidies" from the USF. The only entities that will be subsidized are the eligible schools and libraries. The Commission's rules require that firms that seek to provide service to schools and libraries (including ISPs) are required to submit competitive bids. This process is designed to drive down the prices that schools and libraries pay. As a result, in many cases, an ISP is likely to receive *less* compensation for providing service to a school or library than it would to provide comparable products to other customers. In any case, the Commission and the Court of Appeals have long

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Structure, First Report and Order, 93 F.C.C.2d 241, 344 (1983) ("*Access Charge Order*"), *aff'd sub nom. NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984). The Commission subsequently eliminated this exemption based on its conclusion that "resellers of private lines . . . [should] pay the same charges as those assessed on *other interexchange carriers* for their use of these local switched access facilities." *WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* Second Report and Order, CC Docket No. 86-1, ¶¶ 11-14, *reprinted in* 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

[40] Verizon Comments at 44.

[41] *Id.*

recognized that "equity" does not require any equivalency between the amount that a given entity pays into the USF and the amount that it receives from the fund. [42]

CONCLUSION

For the foregoing reasons, and those contained in ITAA's initial comments, the Commission should preserve – and, indeed, strengthen – the applicable *Computer II* regime. Specifically, the Commission should: (1) reaffirm that the *Computer II* regime is fully applicable to broadband services and that, under that regime, wireline broadband Internet access services are classified as information services; (2) continue to require ILECs to unbundle, and offer as tariffed services, the broadband telecommunications functionality that they use to provide information services; (3) continue to apply Title II requirements – including the Section 251 unbundling requirement – to ILEC-provided broadband telecommunication services, while refraining from extending common carrier regulation to ISPs; (4) replace the failed ONA/CEI regime with a system that ensures that ISPs can access ILEC network features and functions necessary to provide broadband information services; and (5) reaffirm that States are preempted from regulating non-carrier-provided information services, and that the Commission will preempt any State regulation of carrier-provided information services that, as a practical matter, thwarts or impedes pro-competitive Federal policy. The Commission also should decline to extend Universal Service Fund payment obligations to providers of information services –

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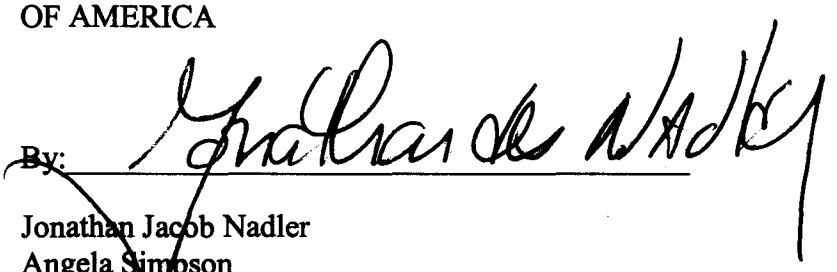
[42] *See Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 426-30 (5th Cir. 1999) (affirming the Commission's decision to require Commercial Mobile Radio Service providers to make payments to the USF, even though the services they provide are not eligible for USF subsidies.).

whether provided over facilities obtained from facilities-based telecommunications carriers, facilities provided by cable system operators, or facilities deployed by the ISP itself.

Respectfully submitted,

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

By: 

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